legally husband and wife. *McGrew v. State,* 13 Tex. App., 34. This was followed in a later case where it was held that it must affirmatively appear that the first marriage relation had been terminated by death or divorce before the defendant could be guilty of incest with the daughter of the second wife, *Harville v. State,* 113 S. W., 283. The facts adjudicated in the principal case are very unusual and the only cases directly in point arose in Texas, where the decisions were in harmony with the decision in the principal case. Since the crime of incest could have been committed by the defendant only in the event the female was legally his stepdaughter, the conclusion in the principal case is logically irresistible.

JURY—RIGHT OF TRIAL BY JURY—IMPAIRMENT—MISCONDUCT OF JUROR. —PEOPLE V. ROSELLE, (CAL.), 129 P., 477. The defendant's attorney made affidavit that he saw a juror asleep during the taking of testimony but did not know how long he had been asleep and that before he could inform the Court a recess was ordered. *Held,* that this was not sufficient ground for a new trial, the juror's condition not being shown to be such that he failed to hear any question or answer.

A new trial is the proper remedy for the misconduct of the jury. *Morgan v. Bell,* (La.) 4 Mart. (O. S.), 615. But the misconduct of a juror must be gross, to afford ground for a new trial. *Harrison v. Price,* 22 Ind., 165. It must also have probably injured the complaining party. *Flatter v. McDermitt,* 25 Ind., 326. It has also been held that the misconduct must be caused by the prevailing party, or some one on his behalf. *Koehler v. Cleary,* 23 Minn., 325. A juror may not talk to the plaintiff concerning the case during recess. (Ky.) *Ironton Lumber Co. v. Wagner,* 119 S. W., 197. Nor express an opinion to outsiders on the merits of the case. *Norcross v. Willard,* 82 Vt., 185. A remark by a juror after verdict, however, is held not to be ground for a new trial. *Goldberg v. Berman,* 33 R. I., 448. But it was not prejudicial error for one or more jurors to play in a card game with others in which the plaintiff and his attorney were playing. *Feary v. Metropolitan St. Ry. Co.,* 162 Mo., 75; *Ayrhart v. Wilhelmy,* (Iowa) 112 N. W., 782. The furnishing of intoxicating liquor, during trial or deliberation on verdict, is ground for a new trial. *Bernier v. Anderson,* 8 Idaho, 675. It has been held that cider, but not intoxicating liquors, may be furnished to a jury. *Tripp v. Bristol County Com'rs.,* 84 Mass., (12 Allen), 556. And the mere fact that jurors had intoxicating liquor in their possession while deliberating was not of itself sufficient to make a new trial necessary. *Richardson v. Jones,* 1 Nev., 405. Where the use of liquor is moderate, and no injury resulted therefrom to the losing party, it is not ground for a new trial. *Gamble v. State,* 44 Fla., 429; *State v. Corcoran,* 7 Idaho, 220. But where the juror is so intoxicated that his faculties are affected, the verdict should be set aside. *Underwood v. Old Colony St. Ry. Co.,* (R. I.) 76 A., 766. The sleeping of jurors was held to be misconduct affording ground for a new trial in Indiana. *Alderman v. Cobb,* 94 Ind., 602. But it was held in Arkansas

that a new trial should not be granted upon affiidavit "that during the trial, or at least a portion of it, one of the jurors was to all appearances asleep." *Pelham v. Page,* 6 Ark. (1 Eng.), 535. Nor is it ground for a new trial where the juror made affidavit that he had a habit of listening with his eyes closed and that he heard what was said by witnesses and counsel. *Continental Casualty Co. v. Semple,* (Ky.) 112 S. W., 1122. It was also held that an appellant cannot complain that a juror slept during argument of counsel, when he did not request the Court to awaken him. *Slaughter v .Coke County,* 34 Tex. Civ. App., 598. Mere conjecture or surmise that the jury acted improperly never requires the granting of a new trial. *McWhorter v. Haigler Mercantile Co.,* (Ala.) 58 So., 790. In case of misconduct of the jury the complainant must call it to the attention of the Court immediately; he may not speculate upon the verdict. *Shepherdson v. Clopine,* 83 Neb., 764; *Ulmer v. Seelman,* 159 Mich., 253; *Woods v. Klein,* 223 Pa., 257. The decision of the principal case is sound in the doctrine it announces that one cannot complain of the misconduct of the jury, unless he does so at the time it happens and shows that he has probably been injured thereby.

MASTER AND SERVANT—"FELLOW SERVANTS"—EMPLOYEES ON DIFFERENT TRAINS.—CHESAPEAKE & O. RY. CO. V. BROWN ET AL., 153 S. W. (KY.), 753.—*Held,* that a brakeman on one train was not a fellow servant of the operatives of another train on the same railroad, by whose negligence he was injured.

The rule most generally followed is that all are fellow servants who are in the same service, and subject to the same general control, even though in different grades and departments. *Farwell v. Boston R. Co.,* 4 Met. (Mass.), 49; *Brown v. Winona, etc., R. Co.,* 27 Minn., 338. Under this rule trainmen working on different trains for the same railway company must be considered fellow servants. *Vermillion v. Balt. & O. R. Co.,* 38 App. D. C., 434; *Mellish v. Pere Marquette R. Co.,* 167 Mich., 86; *Ham v. St. Louis & S. F. R. Co.,* 136 Mo. App., 17. It has even been held that train crews of one railroad company running over the track of another, under the complete control of an employee of the latter, are fellow servants of the train crews of the latter company. *Johnson v. Wheeling Terminal Ry. Co.,* 65 W. Va., 415. Some States, however, hold that for persons to be fellow servants they must work in the same grade or department so as to afford them the power and opportunity of exercising a mutual influence over each other promotive of proper caution. *Thompson v. Northern Hotel Co.,* 99 N. E. (Ill.), 878; *Missouri Pac. R. Co. v. Dwyer,* 36 Kan., 58; *Pittsburg R. Co. v. Devinney,* 17 Ohio St., 197. Under this rule the train crews of different trains have been held not fellow servants. *Chicago, etc., R. Co. v. House,* 172 Ill., 601; *Cincinnati, etc., R. Co. v. Roberts,* 110 Ky., 856. Motormen of different cars operated by a street railway company have been held not fellow servants. *Louisville Ry. Co. v. Haynes,* 128 S. W. (Ky), 1055. But *contra, Birmingham Ry., etc., Co. v.*